



MONTGOMERY COUNTY ETHICS COMMISSION

Kenita V. Barrow
Chair

Mark L. Greenblatt
Vice Chair

August 21, 2015

Advisory Opinion 15-08-010 Waiver 15-08-010

This is in response to your letter dated July 16, 2015, and email of July 30, 2015, requesting an advisory opinion on the application of certain provisions of the Montgomery County Ethics Law to certain activities you describe and a waiver of application of those laws, to the extent the Commission deems those laws apply to the facts you have provided.

You represent Montgomery County Fire and Rescue Service employees who are members of the local Montgomery County Fire and Rescue Service employee union, the Montgomery County Career Fire Fighters Association (“MCCFFA”)(International Association of Firefighters (IAFF) Local 1664.) Certain County career fire fighters are officers of MCCFFA and “for the time [they] dedicate[] to the organization, . . . receive[] an annual salary, which is based on a percentage of the annual wages of a certain level of firefighter under the wage scale.” One (or more) of these County career fire fighters also serves as an officer of the Professional Fire Fighters of Maryland (“PFFMD”) of which the MCCFFA is a local affiliate, a position for which an annual compensation is paid. (PFFMD is the state “umbrella” organization that represents affiliates of the IAFF in Maryland, such as the MCCFFA.)

You ask whether public employees who are compensated officers of MCCFFA and PFFMD must seek secondary employment approval with the Ethics Commission pursuant to 19A-12(a) of the Public Ethics Law. Section 19A-12(a) prohibits employees from “engaging in any other employment unless the employment is approved by the Commission.” You further request that if the Commission finds that the requirement to seek outside employment does apply to compensated employment with MCCFFA and PFFMD, that the Commission waive the requirement.

Your email supplementing your letter also requests a waiver from the application of 19A-12(b), which states:

MONTGOMERY COUNTY ETHICS COMMISSION

**100 MARYLAND AVENUE, ROOM 204, ROCKVILLE, MARYLAND 20850
OFFICE: 240.777.6670 FAX: 240.777.6672**

Unless the Commission grants a waiver under subsection 19A-8(b), a public employee must not: (1) be employed by . . . any business that . . . (B) negotiates or contracts with the County agency with which the public employee is affiliated.

You state “as the MCCFFA negotiates the Collective Bargaining Agreement with the County government and the fire and rescue division, a waiver of the application of that section is also hereby being requested.” Without a waiver, 19A-12(b) would appear to bar compensated employment by the MCCFFA of a County Fire and Rescue Service employee.

Answer in Brief

For the reasons stated below, the Ethics Commission advises that the prohibitions of 19A-12(a) and 12(b) apply to County employees who are compensated union employees; the Commission, further, waives the 19A-12(b) prohibition on employment with a business that negotiates or contracts with the public employee’s County agency where County employees are elected union representatives of employee organizations certified to represent and collectively bargain with Montgomery County. The Commission does not waive the requirement to seek outside employment approval pursuant to 19A-12(a).

The Requirement to Seek Outside Employment – Section 19A-12(a)

Your submission states that the County “clearly” contemplated that the Public Ethics Law would not apply to public employees who serve as compensated union officials or representatives. If this were the case, however, either the Public Ethics Law or the collective bargaining law would expressly exempt from the ethics requirements County employees serving in compensated positions for certified employee organizations. See 19A-12(c) for exceptions to provisions of 19A-12(a) and 12(b). No such exception is in either the ethics law or the collective bargaining laws. See Chapter 33 of the Montgomery County Code.

In all likelihood, the drafters of these laws did not consider the issue. This could be argued as supporting the inference made in your letter that the drafters would have presumed that the Public Ethics Law could not be read to be concerned with County employees’ participation in collective bargaining activities. This might be a plausible construction if it were not for the absence of any reference in the collective bargaining law to County employees acting as union leaders receiving compensation from the union; the law makes clear union employees may receive (paid) administrative leave from the County, but there is no reference to compensated positions with a union. This is not to say that there is anything wrong with receiving compensation for conducting union business beyond County work hours, it is just to say the collective bargaining law did not overtly contemplate that practice. As the County collective bargaining law and the policy behind it do not address compensated employment with an employee union, the argument that that law “clearly contemplates that the Public Ethics Law would not apply to public employees who serve as compensated union officials or representatives” is unpersuasive. As there is no legal basis presented for a conclusion that 19A-12(a) does not apply to compensated union representatives, the Commission concludes that 19A-12(a) does apply, unless waived by the Commission. Before addressing the issue of whether the

Commission should waive the application of 19A-12(a), the application of the prohibition of 19A-12(b) is relevant.

The Prohibition on Outside Employment with a Business that Negotiates or Contracts with the Public Employee's County Agency

There is no exception in the County's ethics laws pertaining to outside employment activities of union employees. Nor is there any exception to the requirements of the Public Ethics Law contained in the collective bargaining law. Pursuant to the express terms of the ethics law, a County employee may not be employed by an organization that negotiates with the employee's agency, unless the prohibition is waived by the Commission. While in certain respects the collective bargaining between the MCCFFA is with the County, many aspects of the union activities involve negotiations and arrangements between the MCCFFA and the Fire and Rescue Service. Therefore, application of the Public Ethics Law results in the conclusion that compensated employment of a public employee by an organization certified to represent and collectively bargain with the employee's employing agency is prohibited, unless waived.

Waiver of the Prohibition of 19A-12(b)

The standard for issuance a waiver of the prohibition of 19A-12(b) is found in 19A-8(b) which states:

After receiving a written request, the Commission may waive the prohibition of subsection 19A-12(b) if it finds that:

- (1) the waiver is needed to ensure that competent services to the County are timely and available;
- (2) failing to grant the waiver may reduce the ability of the County to hire or retain highly qualified public employees; or
- (3) the proposed employment is not likely to create an actual conflict of interest.

The Ethics Commission determines that 19A-12(b) is waived for the class consisting of those persons being compensated to be employee representatives of organizations certified to represent and collectively bargain with the employee's employing agency.

The collective bargaining laws of Montgomery County contemplate that:

It is the public policy of Montgomery County to promote a harmonious, peaceful, and cooperative relationship between the county government and its employees and to protect the public by assuring, at all times, the responsive, orderly, and efficient operation of county government and services. Since unresolved disputes in public service are harmful to the public and to employees, adequate means should be available for preventing disputes and for resolving them when they occur. To that end, it is in the public interest that employees have the opportunity to bargain collectively over wages, hours, and other terms and conditions of employment, as authorized by Charter section 511, through a representative of their choice, or to refrain from collective bargaining.

Section 33-101; also see 33-147 concerning Fire and Rescue Collective Bargaining, “to promote a harmonious, peaceful, and cooperative relationship between the County government and its fire and rescue employees and to protect the public.”

County law intends that County employees collectively bargain with the County; the law recognizes that such bargaining is important to the operations of county government. Section 19A-12(b) prohibits employees from having divided loyalty as a result of receiving compensation from a party that is doing business with their agency. In the context of union activities, the divided loyalty of being a government employee and in working as an officer of the union is provided for by statute. Actions taken that are taken in accord with the collective bargaining law, which are *per se* in furtherance of the operation of County government and in the public interest, are not a conflict of interest.¹ In the view of the Ethics Commission, the fact that an employee representative is compensated by a union to execute a function that is deemed by law to be in the public interest does not create a conflict of interest, as that employee would be receiving compensation from the organization comprised of persons whose interests the employee is representing.

Use of Public Office for Private Gain

One related issue is whether a union representative can receive compensation from a union for performing union duties consistent with the requirement that the prestige of office not be used for private gain.²

County Ethics Law prohibits employees from intentionally using their public office for private gain. In other contexts, this has been viewed as meaning that an employee could not receive payment beyond that received through government salary for outside activity directly and immediately related to the official’s duties. Using this formulation, the issue is whether serving as an elected union representative is “directly and immediately related to the official’s duties.”

The Commission concludes that receiving compensation for being a union representative is not directly and immediately related to the official’s duties. The set of responsibilities that accrue to

¹ This waiver does not address whether a County employee can take action as part of the employee’s officially assigned duties that has an effect on a union that compensates the employee as an employee representative. See 19A-11(a)(1)(B).

² While your inquiry does not address the propriety of receiving union pay for periods of time a County employee is on administrative leave and drawing a County paycheck to represent the union, the Ethics Commission can find no prohibition for this. Whether and how much compensation union representatives receive is up to the union. Presumably in making compensation decisions, elected officials’ entitlement pursuant to the collective bargaining agreement to paid administrative leave is accounted for by the relevant union. In short, the unions themselves are in the best position to determine what appropriate pay should be to persons who are representing the union to the County. Contra. Office of Government Ethics Letter to a Deputy Agency Ethics Official dated February 25, 1992; (if the “Federal Government must continue to pay employees their usual Government salaries during the time they are engaged in Union activities, those employees should be considered ‘on the job’ for purposes of pay and compensation”, finding the prohibition on supplementation of Government employee salary pursuant to 18 U.S.C. § 209 bars receipt of union pay during government work time.)

an elected official of a union are separate from the duties that the individual has as a County employee. This is why the employee must take leave in order to perform the duties for the union; if the union responsibilities were part of the employee's official duties, the employee would not be required to take leave to execute the union responsibilities. While the employee would not likely have been voted to be the representative of County employees had the employee not been one, this does not mean that the set of union duties are directly and immediately related to the employee's official duties. In the opinion of the Ethics Commission, receiving union pay for being a County employee who has been elected to be an official of a union is not a use of the prestige of office for private gain.

Denial of Request for Waiver of Section 19A-12(a)

In support of your request for a waiver of the requirement that employees obtain outside employment approval from the Commission, you cite to the County laws establishing the framework for collective bargaining, and conclude that the outside approval process established pursuant to the County's Public Ethics Law "would have a chilling effect on qualified candidates being appointed." You also state that it is "contrary to the Fire/Rescue Bargaining Law to allow any County representative to make a determination as to which fire and rescue employee can and cannot participate in the activities of the employee organization."

The Commission does not believe that the requirement to request outside employment approval creates a chilling effect for County employees seeking to be union representatives; the concern you express seems to be more about the possibility of unreasonable withholding of approval by the agency involved or the Ethics Commission. A "chilling effect" implies some punishment or suppression for conducting a particular activity. The filing of the outside employment form is not a punishment or suppression; it involves the same requirement and process that all County employees engaged in compensated outside employment are required to engage.

The Commission notes that the collective bargaining law and agreement clearly contemplate that someone will be the union representative and that representative will be well known by the Government; as this is inherent to the relationship, the Commission does not see how requesting a representative to go through the process required by law for outside employment will create a chilling effect.

Also, the Commission understands that the current agreement between the MCCFFA and the County, at Section 2.3.C., contemplates that "[a]ll requests for administrative leave [for carrying out union activities] shall be submitted in writing by the Union to the Fire Chief or his/her designee no later than fourteen calendar days prior to the requested date. . . Such requests shall not be unreasonably denied." Certainly the statutory outside employment request is no more "chilling" than this requirement contained in the collective bargaining agreement.

The Commission cites the requirement in the Public Ethics Law that the Commission disclose to the public each action approving an employment request. In the law, therefore, there is built-in transparency to outside employment activities of County employees. Were the Commission to grant a waiver of the request requirement for certain activities, the Commission would be waiving (and, therefore, denying) public transparency to those activities.

As your submission indicates, the standard for issuance of a waiver for the 19A-12(a) requirement is 19A-8(a). In order for the Commission to grant a waiver under 19A-8(a), the Commission is required to conclude, among other things, that the waiver is in the best interest of the County. As County law contemplates that all outside employment activities be approved by the Ethics Commission and be made public and without a compelling reason to waive the requirement, the Commission cannot find that it is in the best interest of the County to waive the outside employment requirement for the class of individuals comprised of union representatives. Accordingly, the Commission does not waive the requirement of 19A-12(a), so County employees who are compensated by unions are required to follow the outside employment request process required by County law.

For the Commission:



Kenita V. Barrow, Chair